EFFECT OF JUDGMENT AGAINST ONE JOINT TORT-FEASOR ON THE LIABILITY OF ANOTHER.—It was early settled in England that judgment and satisfaction against one of several joint tort-feasors is a bar to an action against another for the same cause,[1] and this has always been the law in the United States.[2] The case of *Brown* v. *Wootton*, decided in England in 1606,[3] is regarded as having established the rule there that the mere recovery of judgment against a tort-feasor operates to discharge another joint tort-feasor from liability.[4] Up to the time of this decision this point does not seem to have been expressly passed on. Though for a time the rule in *Brown* v. *Wootton* was not always recognized,[5] it has since been followed, and is law in England today.[6]

While some of the earlier decisions in this country followed the English view,[7] Virginia is the only state at the present time which unqualifiedly adheres to it.[8] A doctrine which was upheld in many of the states at an early period is, that an injured party may have separate actions and recover separate judgments against each joint wrongdoer, and may then elect *de melioribus damnis*, but that his taking out execution against one of the tort-feasors, whether satisfied or not, constitutes a final election not to proceed against the others.[9] However, this rule is not in force at the present time in any jurisdiction, with the exception perhaps of Michigan.[10] The great majority of the courts in this country, adopting a rule which seems to be far sounder on principles of law and justice than the rule in England, have decided that nothing short of full satisfaction or its equivalent against a tort-feasor will bar a party from proceeding against other joint wrongdoers who were not parties to the first judgment.[11] Partial satisfac-

[1]Morton's Case (1584) Cro. Eliz. 30; Cocke *v.* Jennor (1614) Hobart 66.

[2]Duane *v.* Goodall (1863) Fed. Cas. No. 4105; McCoy *v.* Louisville & N. R. R. (1905) 146 Ala. 333, 40 So. 105; Mitchell *v.* Libbey (1851) 33 Me. 74; Kasson *v.* People (N. Y. 1864) 44 Barb. 347.

[3]Cro. Jac. 73.

[4]Though the plaintiff in this case had levied execution in addition to recovering judgment, the court put their decision on the ground that the judgment alone was a bar.

[5]See Corbet *v.* Barnes (1636) W. Jones 377; Cocke *v.* Jennor, *supra*.

[6]Day *v.* Porter (1838) 2 Moody & R. 151; Brinsmead *v.* Harrison (1872) L. R. 7 C. P. 547.

[7]Gray *v.* Nations (1839) 1 Ark. *557; Wilkes *v.* Jackson (1808) 12 Va. 355; see Holden *v.* Reed (N. H. 1809) Smith 278.

[8]Petticolas *v.* Richmond (1897) 95 Va. 456, 28 S. E. 566. In Rhode Island, the court decided, in an early case, that judgment in trover against one of two joint tort-feasors is a bar to an action against another. Hunt *v.* Bates (1862) 7 R. I. 217. While this holding has not been overruled, it has been strictly confined to cases of trover and trespass for taking property. Parmenter *v.* Barstow (1899) 21 R. I. 410, 43 Atl. 1035.

[9]White *v.* Philbrick (1827) 5 Me. 147, overruled in Cleveland *v.* City of Bangor (1895) 87 Me. 259, 32 Atl. 892; see Livingston *v.* Bishop (N. Y. 1806) 1 Johns. *290.

[10]Kenyon *v.* Woodruff (1876) 33 Mich. 310; see Blackman *v.* Simpson (1899) 120 Mich. 377.

[11]Lovejoy *v.* Murray (1865) 70 U. S. 1; Sheldon *v.* Kibbe (1819) 3 Conn. 214; Hunt *v.* New York N. H. & H. R. R. (1912) 212 Mass. 102, 98 N. E. 787. Payment of judgment into court by one joint tort-feasor without the plaintiff's assent does not preclude the plaintiff from proceeding against the others. See 3 Columbia Law Rev. 214.

tion operates only as an extinguishment *pro tanto* of the damages recoverable against the other joint wrongdoers.[12] This view is well illustrated in the recent case of *Ketelson* v. *Stilz* (Ind. 1916) 111 N. E. 423. There the plaintiff brought an action in tort against the defendant, who demurred on the ground that the plaintiff had already recovered judgment and sued out execution against a joint tort-feasor. The execution had been returned *nulla bona*. The court held that the plaintiff was entitled to proceed until she obtained full satisfaction, overruling previous decisions that judgment and execution, without satisfaction, were a bar.[13]

It is submitted that none of the grounds on which the English doctrine rests is satisfactory. One of them is, that the rendition of judgment changes the damages, which before were uncertain, into certainty; the claim consequently becomes merged in the judgment, and thus the right of action against the others is taken away.[14] In this country, however, it is held that, inasmuch as joint tort-feasors are not only jointly but also severally liable,[15] the rendering of judgment against one of them does not merge the cause of action against the others any more than in the case of joint and several contractors.[16] A second ground on which the decisions in England are based is that, in cases of trespass or trover for taking property, the mere rendering of judgment transfers the title in the goods to the defendant, by relation back as from the time of the conversion, and that therefore the plaintiff may not maintain any further action for that which is not his.[17] But it is almost universally held in the United States that judgment alone against one who has converted goods does not vest the property in the defendant, but that satisfaction also is necessary.[18] It is said that to allow a number of judgments would in effect encourage any number of vexatious actions wherever there happen to

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[12]Murray *v.* Lovejoy (C. C. 1863) Fed. Cas. No. 9963; Brison *v.* Dougherty (1873) 62 Tenn. 93.

[13]Allen *v.* Wheatly (Ind. 1834) 3 Blackf. *332; Ashcraft *v.* Knoblock (1896) 146 Ind. 169, 175, 45 N. E. 69.

[14]Brown *v.* Wootton (1606) Cro. Jac. 73; Brinsmead *v.* Harrison, *supra*. The English courts seem to regard a joint tort as in nature like a joint contract, except that there can be no contribution as between joint wrongdoers, and that consequently one of several joint wrongdoers has no right to complain if the others are not joined in the action. See King *v.* Hoare (1844) 13 M. & W. *494; 7 Albany Law Journal, 81. Judgment against one joint obligor, without satisfaction, is everywhere a bar to an action against another. King *v.* Hoare, *supra;* see Mason *v.* Eldred (1867) 73 U. S. 231.

[15]1 Cooley, Law of Torts (3rd ed.) 224; see Hayden *v.* Woods (1884) 16 Neb. 306.

[16]Miller, J., in Lovejoy *v.* Murray, *supra,* at p. 16, speaking of the English doctrine, says: "We apprehend that no sound jurist would attempt, at this day, to defend it solely on the ground of *transit in rem judicatam.*"

[17]Fenner, in Brown *v.* Wootton, *supra,* said: "In case of trespass, after the judgment given, the property of the goods is changed, so as he may not seize them again." See Buckland *v.* Johnson (1854) 15 C. B. *145; *cf.* Adams *v.* Broughton (1737) 2 Str. *1078; *contra,* Brinsmead *v.* Harrison (1871) L. R. 6 C. P. *584. This argument, of course, is applicable only to torts involving the taking or converting of property. See Parmenter *v.* Barstow, *supra;* Lovejoy *v.* Murray, *supra,* at p. 13.

[18]Spivey *v.* Morris (1850) 18 Ala. 254; Atwater *v.* Tupper (1877) 45 Conn. 144; Osterhout *v.* Roberts (N. Y. 1827) 8 Cow. *43.

be several joint wrongdoers.[19] However, there is no good reason for denying a rule, sound in principle, simply because that rule might be abused.[20]

RELINQUISHMENT OF EXPECTANT ESTATE BY HEIR.—There is a diversity of opinion among American courts as to what force is to be attached to a release to the ancestor of an heir's expectancy in consideration of a present advance. It seems clear that such a release should have no effect in law, since only such rights are thereby passed as the releasor has at the time the release is made.[1] It is an elementary principle of common law that no one can be the heir of the living. It would therefore seem that no child should be able to release or quitclaim at law his interest in his parent's estate, since, as he may not be heir, he has nothing to release or quitclaim.[2] However, the effect of this common law rule is modified by the law of advancements and by the interference of equity.[3]

An advancement is an irrevocable gift *in praesenti* of real or personal property to a child by a parent to enable the donee to anticipate his inheritance to the extent of the gift.[4] There is a presumption that a substantial surrender of money or property by a parent to a child is intended to be an advancement chargeable to the child in the distribution of the parent's estate.[5] It is held that a release of all claims against the ancestor's estate, though void as a release, clearly shows an intent to make an advancement.[6] In a few instances, courts of

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[19]Kelly, C. B., in Brinsmead *v.* Harrison, *supra.* This reason would apply equally well in the case of joint and several contracts. Nevertheless, even in England, only full satisfaction bars an obligee from proceeding against joint and several obligors.

[20]See discussion of the English view in Freeman, Judgments (3rd ed.) § 236.

[1]Headrick *v.* McDowell (1903) 102 Va. 124, 43 S. E. 804; Co. Lit. 265: "But here in the case which Littleton puts where the sonne release in the life of his father, this release is void, (*a*) because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the sonne shall enter into the land against his own release."

[2]Cass *v.* Brown (1894) 68 N. H. 85, 44 Atl. 86.

[3]But contracts by which the heir attempts to convey to a third party his expectancy are often held to be void both in law and in equity as a fraud on the ancestor, Boynton *v.* Hubbard (1810) 7 Mass. 112, unless made with the ancestor's consent. Fitch *v.* Fitch (1829) 25 Mass. 480; but see Hale *v.* Hollon (1897) 90 Tex. 427, 39 S. W. 287. The fact that the ancestor is insane and incapable of giving his consent does not alter this rule. McClure *v.* Raben (1892) 133 Ind. 507, 33 N. E. 275; *contra,* Hale *v.* Hollon, *supra.*

[4]Asgood *v.* Breed (1821) 17 Mass. 356; see Gary *v.* Newton (1903) 201 Ill. 170, 66 N. E. 267.

[5]Hatch *v.* Straight (1819) 3 Conn. 31; Scott *v.* Scott (1805) 1 Mass. 527; Sanford *v.* Sanford (N. Y. 1872) 61 Barb. 293.

[6]Headrick *v.* McDowell, *supra*; Elliott *v.* Leslie (1907) 124 Ky. 553, 99 S. E. 619; Cannon *v.* Nowell (1859) 51 N. C. 436. But the doctrine of advancements does not apply to cases of unintentional partial intestacy. Needles's Ex'r. *v.* Needles (1857) 7 Oh. St. 432.